

- (1) What is the nature and extent of claimant's January 31, 1998, injury? Claimant is seeking a permanent partial disability award based upon his functional impairment. Claimant is not alleging a work disability resulting from these injuries.

- (2) Did the Administrative Law Judge err in finding that claimant had failed to meet his burden of proving neuropsychological damage from the January 31, 1998, date of accident?
- (3) Has claimant proved that he suffered an accidental injury on August 17, 1999?
- (4) Has claimant proved that the alleged accident of August 17, 1999, arose out of and in the course of his employment?
- (5) What is the average weekly wage for the alleged August 17, 1999, accident?
- (6) What is the nature and extent of claimant's alleged accidental injury of August 17, 1999?
- (7) Is claimant entitled to future medical treatment and, if so, for which alleged accident date and for which injuries?
- (8) Did the Administrative Law Judge err in allowing into evidence certain videotapes of claimant offered by respondent when the individuals who took the videotapes were not deposed, but instead "testified" by affidavit only?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Appeals Board finds that the decision by the Administrative Law Judge to allow the introduction of the videotapes should be reversed, but in all other regards the Award of the Administrative Law Judge should be affirmed.

Respondent introduced six videotapes at preliminary hearing. The foundation for those videotapes of claimant was presented by the affidavit testimony of Al Wheeler and Kenneth Niesz, private investigative experts. Neither Mr. Wheeler nor Mr. Niesz testified in this matter. At preliminary hearing, the Administrative Law Judge admitted the tapes into evidence over claimant's objection based upon the affidavits and advised claimant's counsel that, in all likelihood, those affidavits would be sufficient to allow the tapes into evidence at the time of regular hearing and final decision.

At regular hearing, the Administrative Law Judge again overruled claimant's counsel and admitted the tapes into evidence based upon the affidavits. Neither counsel elected to depose Mr. Wheeler or Mr. Niesz.

In considering the affidavits, the Appeals Board notes that neither affidavit discusses videotape #4, which was admitted into evidence along with videotapes #1, #2, #3, #5 and #6. The Appeals Board finds no foundation was laid to admit videotape #4 and the Administrative Law Judge's decision to allow videotape #4 into evidence is reversed.

The test to be applied when a claim is made that evidence was erroneously admitted in a workers' compensation proceeding is whether "the decision is based upon substantial and satisfactory evidence, relevant, reasonable and persuasive, though not technically admissible under the rules of evidence." Boeing Military Airplane Co. v. Enloe, 13 Kan. 128, 764 P.2d 462 (1988), *rev. denied* 244 Kan. 736 (1989).

As to the remaining videotapes, it is acknowledged that the rules of evidence under K.S.A. Chapter 60 are generally not applicable in workers compensation proceedings. Jones v. Continental Can Co., 260 Kan. 547, 920 P.2d 939 (1996). "The admissibility of evidence is more liberal in compensation cases, not more restrictive." Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

"The underlying and critical distinction lies on the basic evidentiary requirement that a proper, competent foundation must be present before opinion evidence may be presented." Roberts v. J. C. Penney Co., 263 Kan. 270, 949 P.2d 613 (1997).

The Appeals Board finds the affidavit foundation insufficient to support the introduction of those videotapes into evidence and to support their consideration as part of the evidentiary record in this file. In that regard, the Award of the Administrative Law Judge is reversed.

With regard to the remaining issues, the Appeals Board finds that the Award of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein.

The Appeals Board finds especially convincing the testimony of claimant's chiropractor, Robert W. Warner, D.C., and respondent's psychiatric expert, Michael J. Pronko, M.D. Dr. Warner assessed claimant a 5 percent impairment to the body as a whole for his cervical spine problems only. Dr. Warner's impairment was based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Dr. Warner had the opportunity to examine claimant and review x-rays, CT scans, MRIs and EMGs performed earlier. Dr. Warner found claimant unconvincing when he discussed limitations to his right and left upper extremities which claimant alleges occurred as a result of the January 31, 1998, fall.

It is acknowledged claimant was examined by Edward J. Prostic, M.D., at claimant's attorney's request on May 5, 2000. Dr. Prostic also had the opportunity to examine

claimant and review certain tests performed on him. The Appeals Board first notes that, in assessing claimant a functional impairment, Dr. Prostic elected for unexplained reasons to use the AMA Guides, Fourth Edition, range of motion model. As was explained by Dr. Warner, the AMA Guides prefers the use of the DRE model unless for some reason the DRE model does not address the issue or is not appropriate under the circumstances. Dr. Warner testified that the use of the DRE model, in this instance, was the proper method as it addressed claimant's condition.

Additionally, it is noted that Dr. Prostic assessed claimant a substantial impairment for his right and left upper extremity injuries based upon the understanding that claimant suffered a fall at the time of the January 31, 1998, accident. Dr. Prostic testified that this type of injury could very possibly aggravate the claimant's preexisting degenerative changes, which included radial tunnel syndrome, left carpal tunnel syndrome with wrist arthritis, and osteoarthritis of the right elbow. However, in comparing claimant's testimony with that of claimant's son, the Appeals Board finds significant conflict in the record regarding whether claimant actually suffered a fall on January 31, 1998. While claimant testified that he was knocked unconscious and fell to the ground when struck in the head by the metal caster, his son testified that, even though he was working in the same approximate area as his father, he never noticed his father lose consciousness and at no time did he testify that he saw his father lying on the ground. Claimant's son testified that he heard the sound of the object striking his father which, while incredible under the circumstances, did cause him to turn around and look in his father's direction. He saw his father staggering and apparently holding his head, but at no time witnessed his father on the ground or unconscious.

The Appeals Board finds that claimant's testimony in this matter is less credible than that of his son regarding the mechanics of his injuries suffered on January 31, 1998. The Appeals Board, therefore, finds claimant has failed to prove that he aggravated his preexisting bilateral upper extremity conditions as a result of the January 31, 1998, accident.

With regard to the alleged August 17, 1999, accident, the Appeals Board finds the medical evidence does not support claimant's contention that he suffered any type of accidental injury on that date. The medical records contemporaneous with that alleged accident indicate that claimant had only a small mark on the top of his head, which was described as being shaped like a fingernail. There were no witnesses to this alleged fall. The Appeals Board again finds claimant's credibility to be lacking.

While claimant also alleged a series of accidents from January 31, 1998, through August 17, 1999, neither claimant's testimony nor the medical evidence in the record supports a finding that claimant proved accidental injury arising out of and in the course of his employment through a series of traumatic incidents. The Appeals Board finds

claimant has failed to prove that he suffered accidental injury on August 17, 1999, or through a series of microtraumas from January 31, 1998, through August 17, 1999.

The Appeals Board further finds claimant has failed to prove that he suffered any type of neuropsychological damage directly attributable to the January 31, 1998, accident. Donald W. Tiffany, Ph.D., a clinical psychologist in Lawrence, Kansas, testified on claimant's behalf. However, Dr. Tiffany's testimony was not consistent with the AMA Guides. Dr. Tiffany testified that he used three criteria in evaluating claimant's psychological problems. Those included routine skills, cognitive organization and emotional/interpersonal skills as categories. Dr. Tiffany acknowledged that none of those categories were contained in the AMA Guides. As is pointed out in the Administrative Law Judge's Award, the AMA Guides considers activities of daily living, social functioning, concentration and adaptation. Those criteria were not used by Dr. Tiffany in considering what, if any, psychological impairment claimant may have suffered as a result of the injury of January 31, 1998.

Dr. Pronko, a psychiatrist practicing in Prairie Village, Kansas, examined claimant on October 7, 1999, at respondent's request. He found claimant to present the classic criteria for malingering. He determined that claimant's symptoms were greatly exaggerated and motivated by financial goals. Dr. Pronko opined claimant had no rateable psychiatric disability. Dr. Pronko also testified that, in his opinion, Dr. Tiffany misdiagnosed claimant's condition.

Claimant's own testimony does significant damage to his claims, including the allegations of psychological trauma. Claimant alleges numerous ongoing problems associated with the head injury, including increased aggression, an antisocial personality, headaches, numbness and tingling into his upper extremities, a reduction in his intelligence quotient, slowed speech and photophobia. Claimant has a history of being in trouble with the law, of stealing, of fighting since his teenage years and of antisocial personality.

Claimant's contention that his speech has in some fashion slowed was contradicted by the preliminary hearing testimony of respondent's manufacturing business unit leader, Shawn Knox. He testified that, while claimant's speech is very deliberate and very slow, that is very similar to claimant's speech patterns prior to the injury. In addition, Mr. Knox acknowledged that, while they were on the floor and claimant was forced to speak in a loud voice, he had no difficulty hearing claimant, even though there was substantial noise in the area and Mr. Knox was wearing earplugs.

Finally, claimant alleged that photophobia prevented him from going into bright sunlight without eye protection. Claimant testified that, because of the photophobia, at times he would drive his car with his eyes closed. Claimant was observed in doctors' offices and at hearings closing his eyes due to the alleged lighting intolerance. However, Mr. Knox never noticed claimant having any difficulty with the lights at Goodyear. It is also

significant that Dr. Prostic, claimant's medical expert, found no indication of photophobia during his examination of claimant. The Appeals Board again is faced with the contradictions created by claimant's testimony versus the medical and lay witness testimony in the record. The Appeals Board finds claimant's testimony is not credible.

The Appeals Board finds claimant has proven by a preponderance of the credible evidence that he suffered a 5 percent impairment to his cervical spine as a result of the injury of January 31, 1998. While it is somewhat speculative that claimant suffered an injury, considering the diminutive physical findings after he was struck by the metal object, i.e., the lack of bleeding, the lack of swelling and the lack of any scarring on his forehead, the Appeals Board does find that it is more probable than not that claimant suffered a cervical injury as a result of the accident and awards claimant a 5 percent impairment to the body as a whole pursuant to Dr. Warner's opinion.

With regard to claimant's request for future medical treatment, the Appeals Board finds, as did the Administrative Law Judge, that claimant is entitled to future medical upon proper application to and approval by the Director. This medical treatment would be limited to the results of the injury suffered on January 31, 1998. With regard to claimant's allegations of a series of injuries through August 17, 1999, and a specific trauma on August 17, 1999, the Appeals Board finds claimant's request for future medical treatment should be denied.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that an award is granted in favor of the claimant, Arthur W. Davis, III, and against the respondent, Goodyear Tire and Rubber Company, and its insurance carrier, Travelers Insurance Company, for an injury occurring on January 31, 1998, for a 5 percent permanent partial disability to the body as a whole.

Claimant is entitled to 62.57 weeks of temporary total disability compensation at the rate of \$351 per week totaling \$21,962.07, followed by 18.37 weeks permanent partial disability compensation at the rate of \$351 per week totaling \$6,447.87 for a 5 percent permanent partial general body disability, making a total award of \$28,409.94.

As of the date of this award, all amounts are due and owing and ordered paid in one lump sum, minus any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of June 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Lawrence, KS
John A. Bausch, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director